UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS, LLC, and CHARLES ROBINSON	Cases.14-CA-197985 and 14-CA-2092

IDENTITY OF AMICUS CURIAE

FordHarrison, LLP is a law firm that represent employers in labor, employment, immigration, and employee benefits matters.

INTRODUCTION

On September 5, 2019, the National Labor Relations Board ("NLRB" or "Board") invited interested parties to file briefs "to aid the Board in reconsidering the standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the [National Labor Relations] Act." *GM LLC*, 2019 NLRB LEXIS 499, *4 (N.L.R.B. September 5, 2019). Specifically, the Board invited interested amici to respond to five questions identified as follows:

> 1. Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act? In *Plaza Auto*, although the nature of Aguirre's outburst weighed against protection, the Board found that the other three *Atlantic Steel* factors favored protection, and it concluded that Aguirre retained the Act's protection. And although the *Plaza Auto* majority did not say that the nature of the outburst could never result in loss of protection where the other three factors tilt the other way, it also did not say

that it ever could. Are there circumstances under which the "nature of the employee's outburst" factor should be dispositive as to loss of protection, regardless of the remaining *Atlantic Steel* factors? Why or why not?

2. The Board has held that employees must be granted some leeway when engaged in Section 7 activity because "[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). To what extent should this principle remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex?

3. In determining whether an employee's outburst is unprotected, the Board has considered the norms of the workplace, particularly whether profanity is commonplace and tolerated. *See, e.g., Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982). Should the Board continue to do so? If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?

4. Should the Board adhere to, modify, or abandon the standard the Board applied in, *e.g., Cooper Tire, supra, Airo Die Casting*, 347 NLRB 810 (2006), *Nickell Moulding*, 317 NLRB 826 (1995), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 NLRB 510 (1989), to the extent it permitted a finding in those cases that racially or sexually offensive language on a picket line did not lose the protection of the Act? To what extent, if any, should the Board continue to consider context -- e.g., picket-line setting -- when determining whether racially or sexually offensive language loses the Act's protection? What other factors, if any, should the Board deem relevant to that determination? Should the use of such language compel a finding of loss of protection? Why or why not?

5. What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act? How should the Board accommodate both employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?

Id.

This brief is primarily responsive to questions one, four, and five listed above. In short, the undersigned contends that the Board should revise its existing standard regarding the use of profane outbursts and racial and sexually offensive statements in the workplace. As described in more detail below, the Board should cease its current practice of protecting employees who engage in objectionable or abusive behavior, both in the regular employment context as well as on the picket line, under the semblance that such conduct is protected under Section 7 of the National Labor Relations Act ("NLRA" or "Act"). Instead, the Board should find that employers may enforce their policies against profanity, and racially and sexually offensive statements in the workplace regardless of whether the offensive statements are made in the context of Section 7 activity so long as discipline is not more harshly enforced based on an employee's Section 7 activity.

ARGUMENT

I. EMPLOYERS SHOULD BE ABLE TO PROHIBIT PROFANITY AND SEXUALLY AND RACIALLY OFFENSIVE LANGUAGE AT THE WORKPLACE

Employees should not be given unrestricted freedom to speak in a manner that otherwise would not be tolerated in a private workplace simply because the speech is connected with Section 7 activity. *See GM LLC*, 2019 NLRB LEXIS at *4 (asking in question one what circumstances profane language should lose protection of the Act). If discussing any other topic, employees are expected to abide by certain rules. However, if Section 7 activity is involved, the law currently assumes that employees lose their ability to control themselves. *See Plaza Auto Center*, 360 NLRB 972, 973 (2014) (employee shouted profanities at her manager, including such phrases as "fucking mother fucking," "fucking crook," and "asshole."); *Pier Sixty, LLC*, 362 NLRB 505 (2015) (employee posted on social media that his Assistant Director "is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuckk his mother and his entire fucking

family!!!!..."); *Cooper Tire*, 363 NLRB No. 194, at *16 (2016) (picketing employees yelled at African American replacement workers "Hey, did you bring enough KFC for everyone?", "Go back to Africa, you bunch of fucking losers.", and "Hey, anybody smell that? I smell fried chicken and watermelon."). What kind of credit does that lend to the modern employee?

Employers should not be required to tolerate objectively vulgar language. Instead, they should be permitted to enforce their policies against profanity, and racially and sexually offensive statements even if made in the context of Section 7 activity so long as discipline is not more harshly enforced based on an employee's Section 7 activity. *See Republican Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945) (noting that the law requires "an adjustment between the undisputed right of self-organization assured to employees…and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."); *Indian Hills Care Center*, 321 NLRB 144, 151 (1996) (among the specific types of conduct that could exceed the protection of the Act are vulgar, profane, and obscene language directed at a supervisor or employer, even though uttered in the course of protected concerted activity).

Reasonable restrictions on the use of profanity and racially and sexually offensive language does not impose an undue restriction on employees Section 7 rights. In fact, the Board has routinely reprimanded parties for the use of inappropriate or unprofessional comments during proceedings before the Board. *See, e.g., Advance Waste Systems*, 306 NLRB 1020, 1032 (1992); inappropriate or unprofessional comments about the judge, *Maietta Contracting*, 265 NLRB 1279, 1279–1280 (1982), *enfd. mem*. 729 F.2d 1448 (3d Cir. 1984); profanity directed towards counsel and the judge,

refusal to obey the judge's instructions, and accusing the judge of "taking money," *State Bank of India*, 283 NLRB 266, 277-278 (1987); violating the judge's witness sequestration order, *Seattle Seahawks*, 292 NLRB 899, 908 (1989), *enfd. mem.* 888 F.2d 125 (2d Cir. 1989); and willfully taking frivolous positions at the trial to delay and abuse the Board's processes, *Nursing Center at Vineland*, 318 NLRB 337, 344 (1995). Other examples include talking loudly, interrupting while witnesses are testifying, interposing baseless objections, and evading or disregarding the judge's rulings. 675 West End Owners, above. *See also Government Employees (IBPO)*, 327 NLRB 676 (1999); and *Alan Short Center*, 267 NLRB 886 n.1 (1983).

Importantly, the right to bring and defend matters before the Government, including the Board, is ***expressly protected by the First Amendment***: "Congress shall make no law … abridging … the right of people … to petition the Government for a redress of grievances." USCS Const. Amend. 1. Notwithstanding that Constitutional right, pursuant to 29 C.F.R. § 102.177, the Board has authority to issue an admonishment or reprimand for misconduct by any person during a hearing. *See e.g. Stuart Bochner*, 322 NLRB 1096 (1997) (Board issued a 2 ½ year suspension to an attorney for various misconduct, including lying to a judge); *Joel I. Kieler*, 316 NLRB 763, 763, 766-770 (1995) (Board issues a 1-year suspension to an attorney for various misconduct, including repeatedly referring to the General Counsel as a "liar"); *Advance Waste Systems*, 306 NLRB 1020, 1032 (1992) (recommend issuing a warning to counsel for inappropriate or unprofessional comments about the judge). The rule restricts the manner in which citizens exercise their First Amendment right to petition the government (NLRB) for the redress of grievances.

There is no basis for granting employees greater rights in the exercise of their Section 7 rights. An explicit constitutional right should not be subject to greater restrictions than an implicit statutory right. Moreover, unlike hearing officers and administrative law judges, most employers

own the property or have some other property interest at the place of employment. Thus they also have property rights protected by the United States Constitution, which provides even a stronger basis to allow employers to promulgate and enforce reasonable rules against profanity and racially and sexually offensive comments. As a result, if an employer has a rule of conduct, it should be able to discipline an employee for violation of that rule, even if the employee is engaged in Section 7 activity, unless the employee shows the employer has regularly excused similar conduct.

II. ALLOWING EMPLOYERS TO ENFORCE THEIR POLICIES WOULD FURTHER AMELIORATE RACIALLY AND SEXUALLY OFFENSIVE LANGUAGE AT THE WORKPLACE.

The Board should abandon the standard set forth in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), which relieves individuals of their duty to behave as civilized members of our society. *See GM LLC*, 2019 NLRB LEXIS at *6 (asking in question four whether the Board should abandon the standard applied in cases where racially or sexually offensive language on a picket line did not lose protection of the Act.). In *Clear Pine Mouldings*, the Board reevaluated the standard for determining the reinstatement rights of employees engaging in strike-related misconduct. *Id.* The Board created the following test to determine whether verbal threats directed at fellow employees justify an employer's refusal to reinstate: "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Id.* at 1046.

For far too long, the Board, applying the test set forth in *Clear Pine Mouldings*, has excused abhorrent sexually and racially offensive comments under the guise that such conduct should be protected so long as the picketer refrains from violence and physical threats. *See Catalytic, Inc.*, 275 NLRB 97 (1985) (holding profane epithets unaccompanied by an overt or indirect threat are protected); *Nickell Moulding*, 317 NLRB 826, 827-828 (1995) (finding that denial of reinstatement was improper where striker carried a sign that read "Who is Rhonda F sucking today" referencing

an employee who chose to work during a strike); *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989) (striker called a nonstriker a "prostitute," a "whore," and told her she could earn money by selling her daughter); *Airo Die Casting, Inc.*, 347 NLRB 810 (2006) (finding that picketer's use of obscene language, gestures, and the phrase "[F]uck you nigger" directed at a security guard, standing alone without any threats or violence, did not rise to the level where he forfeited the protection provided by the Act); *Detroit Newspapers*, 342 NLRB No. 24 (2004) ("you fuckin' bitch, nigger lovin' whore").

Racial and sexually divisive language should have no place in the modern workforce, regardless of the circumstances. Employers should not be required to employ or reinstate racist and sexist individuals. Practically all employers maintain policies that prohibit discrimination on the basis of a protected characteristic, including a prohibition on harassment. Employers should be able to enforce these policies regardless of whether the comments are made in the context of Section 7 activity.

Indeed, it is prudent for the Board to reconsider its current standard for analyzing offensive statements of a racial or sexual nature, made in the course of otherwise protected activity because the Board's current standard arguably requires employers to violate federal and state laws, which prohibit discrimination and harassment, including Title VII. *See Consolidated Communications, Inc. v. NLRB,* 837 F.3d 1, 20-21 (D.C. Cir. 2016) (Millett, J., concurring) ("I write . . . to convey my substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace.")

CONCLUSION

For the foregoing reasons, the Board should allow employers to enforce their policies against profanity, and racially and sexually offensive statements in the workplace regardless of whether the offensive statements are made in the context of Section 7 activity so long as discipline is not more harshly enforced based on an employee's Section 7 activity.

Respectfully submitted this 12th day of November, 2019

/s/ Paul Beshears
PAUL R. BESHEARS
HENRY F. WARNOCK
PATRICK M. CORLEY
FordHarrison LLP
271 17th St. NW
Suite 1900
Atlanta, GA 30363
Email: pbeshears@fordharrison.com
hwarnock@fordharrison.com
pcorley@fordharrison.com
Office: (404) 888-3800

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